SHIFFON CREATIONS (SINGAPORE) PTE. LTD. v. TONG LEE CO. PTE. LTD.

[O.C.J. (Thean J.) December 29, 1987]

[Singapore – Originating Summons No. 937 of 1984]

Contract – Sale and purchase of unit in a flatted factory – Delay in obtaining subdivision approval and subsidiary strata title – Breach of contract – Claim for specific performance abandoned due to supervening events – Claim for damages pursued – Whether damages can be awarded – Equitable jurisdiction conferred by Lord Cairns' Act – Whether Chancery Amendment Act 1858 (Lord Cairns' Act) applies in Singapore – Damages at common law – Damages at common law cannot be awarded due to clause in agreement.

By an agreement dated November 16, 1976 (the first agreement) the defendants agreed to sell to a company, J.C. Tuin (Pte.) Limited (Tuin), a unit of a flatted factory which was then under construction. The unit was duly constructed and payment of the purchase price made.

On June 15, 1982 or thereabout, Tuin agreed to sell the unit to the plaintiffs. It was agreed that Tuin would deliver a deed of assignment assigning to the plaintiffs all the former's rights and interests under the first agreement. At that time, the subsidiary strata certificate of title of the unit had not yet been issued.

On September 24, 1982, Tuin executed and delivered to the plaintiffs the deed of assignment and the defendants and the plaintiffs entered into a sale and purchase agreement (the second agreement) whereby the defendants agreed to sell to the plaintiffs the premises.

Due to certain events, there was a delay in obtaining the subsidiary strata title of the premises and the subdivision approval.

On October 30, 1984 the plaintiffs took out this originating summons against the defendants. They claimed specific performance and damages. By the time the action came to be heard, the subdivision approval and the subsidiary strata title were then obtained. The original claim of the plaintiffs for specific performance therefore became irrelevant. The plaintiffs claimed damages.

There were two issues to be considered, *i.e.*

(a) whether there was such delay in obtaining the subdivision approval under section 9(3) of the Planning Act and subsidiary strata title of the premises as to amount to a breach of clause 11 of the second agreement, and

(b) if the answer to (a) is in the affirmative, whether the claim of the plaintiffs for damages is barred by the concluding part of clause 11 which stated, *inter alia*, that such delay shall not be a ground for any claim for damages by the purchaser (plaintiffs) against the vendor.

Held: (1) the defendants took a long time in obtaining subdivision approval and the subsidiary strata certificate of title of the premises. The delay was due or attributable to the fault of the defendants' architect. However, the defendants must be treated as having control in relation to matters dealt with or ought to have been dealt with by their professional adviser (the architect). The defendants must be held responsible for any act or omission on the part of their adviser and cannot escape liability by showing that their failure to discharge their obligations under clause 11 was occasioned by those whom they engaged to handle the matter. They were therefore in breach of their obligation under clause 11;

(2) the jurisdiction to award damages in addition to or in lieu of injunction or specific performance is based on statute and is not a matter of inherent jurisdiction of the court;

(3) the court did not have the equitable jurisdiction conferred by Lord Cairns' Act to award damages in lieu of specific performance in this case. This court, however, did have jurisdiction to award damages at law for breach of contract. However, due to the second part of clause 11, damages cannot be awarded at law. Therefore no damages can be awarded either at law or in equity;

(4) the plaintiffs' claim was dismissed.

Cases referred to:

(1) *Oakacre Ltd.* v. *Claire Cleaners (Holdings) Ltd.* [1982] Ch. 197.
(2) *Chapman, Morsons & Co.* v. *The Guardians of the Auckland Union* (1889) 23 Q.B.D. 294.
(3) *Leeds Industrial Co-operative Society Ltd.* v. *Slack* [1924] A.C. 851.
(4) *Price* v. *Strange* [1978] Ch. 337.
(5) *Tan Seng Qui* v. *Palmer* (1808-90) 4 Ky. 251.

ORIGINATING SUMMONS.

Liu Yuen Ming (*Trinel Chakraborty* with him) for the plaintiffs.

Tan Kok Quan (*Tan Sie Bee* with him) for the defendants.

Cur. Adv. Vult.

Thean J.: By an agreement dated November 16, 1976 ("the first agreement"), the defendants agreed to sell to a company, J.C. Tuin (Pte.) Limited ("Tuin"), a unit of a flatted factory, known as Block A, Unit No. 7-8, on the seventh floor of a building called Tong Lee Building, then in the course of construction, on a piece of land, Lot 3142 of Mukim XXIV situate at Kallang Pudding Road. I shall refer to this unit of flatted factory as "the premises" and Tong Lee Building as "the building". The purchase price for the premises was $162,120 and was payable by instalments progressively at various stages of construction of the building. No dispute arose out of the first agreement; the purchase price was fully paid by way of instalments at the times and in the manner as therein provided, and the building was completed; the architect in charge of the project issued a certificate of completion on February 25, 1978, and on the same day a temporary occupation licence in

respect of the building was issued by the Development and Building Control Division. Presumably, Tuin took possession of the premises on or soon after that date.

About 4½ years later, on June 15, 1982 or thereabout, Tuin agreed to sell the premises to the plaintiffs for a total sum of $607,950, including fittings and furniture therein. The subsidiary strata certificate of title of the premises had not, at that time, been issued, and it was arranged that on completion, amongst other things, Tuin would deliver to the plaintiffs a deed of assignment, assigning to the latter all the former's rights and interest under the first agreement including their rights and interest in the premises and the defendants would enter into a fresh sale and purchase agreement with the plaintiffs. Accordingly, on September 24, 1982, which appears to be the date of completion, Tuin executed and delivered to the plaintiffs the deed of assignment, and the defendants and the plaintiffs entered into a sale and purchase agreement ("the second agreement"), whereby the defendants agreed to sell to the plaintiffs the premises at the price and on the terms and conditions in every respect same as those contained in the first agreement. The purchase price of the premises under the first agreement, which had been fully paid by Tuin, was credited to the account of the plaintiffs and the purchase price under the second agreement was treated as having been fully paid. There was no outstanding issue between the plaintiffs and the defendants at that time. The plaintiffs apparently were contented with their acquisition and were not concerned then that the legal title had yet to be transferred to them. No enquiry appeared to have been made by them or their solicitors with the defendants or their solicitors as to when such a transfer was expected to take place.

However, there were two outstanding matters concerning the premises which, at the time of completion of the purchase of the premises by the plaintiffs, those acting for the plaintiffs did not find in any way objectionable or unsatisfactory. First, prior to the plaintiffs entering into the agreement with Tuin for the purchase of the premises, the plaintiffs' solicitors, on May 18, 1982 or thereabout, submitted a legal requisition (exhibit PB 259) to the Development & Building Control Division ("DBCD") and in answer to one of the questions therein DBCD stated that a decision on a proposal, namely: "proposed retention of pump house and additional water tank on roof and additional area to approved ten-storey flatted factory" had been deferred for three months as from December 7, 1981. Surprisingly, no further enquiry on this matter was pursued by the solicitors to ascertain whether any decision had since that date been made, as the three months' deferment had by then expired. Secondly, from that and other answers to the legal requisition the solicitors must have known also that no subdivision approval of the building under section 9(3) of the Planning Act (Cap. 232, 1985 Ed.) had been obtained, and in consequence, no subsidiary strata certificate of title of the premises could have been issued – no such document of title had been issued at the time. Again, no enquiry by the solicitors appeared to have been made with the defendants or their solicitors as to when the sub-division approval and the subsidiary strata certificate of title of the premises would be expected to be obtained by the defendants.

In the construction of the building, the following material deviations from the approved building plans were carried out:

(a) an addition of a pump house and water tank room on the roof, and

(b) an increase of the spacing between the columns by six inches resulting in an increase of the floor area.

These deviations, at the time when they were carried out, had never been approved by DBCD; indeed, that department was not even aware of such deviations initially, and they were only discovered at a later stage when an inspection of the building was carried out. These deviations were drawn to the attention of the defendants' architect in charge of the project, who, on November 20, 1979, submitted an application for the retention of the pump house and the water tank room. On March 14, 1980, DBCD informed the architect that approval in principle of the application was granted subject to certain conditions, and further, as for the increase in the spacing between the columns, the architect was requested to verify the floor area. On August 28, 1980, the architect submitted to DBCD plans for retention of the pump house and the water tank room on the roof and the enlarged floor area of the building, and on January 16, 1981, the architect submitted a set of calculation of the floor areas for verification by DBCD. On August 7, 1981, however, DBCD was instructed by the Ministry of National Development to defer consideration of the application for three months. Subsequently, by a series of extensions, the deferment was extended to Sep-

tember 30, 1983. The reason for such a long deferment was that action was being taken against the architect for making changes to the building without approval of the competent authority. The architect eventually was prosecuted and convicted of the offence and was fined.

After the conviction, DBCD reactivated the proposal, and eventually on July 23, 1984 – nearly four years after the application was first submitted by the architect – DBCD by a letter of that date informed the architect that the application was approved subject to certain conditions. Two of the conditions imposed were the payment of development charge for the increase in the plot ratio which was brought about by the increase in the floor area, and the payment of a penalty of $106,200 for having carried out the deviations without any planning approval. The fulfilment of these two conditions occasioned further delay. Following that letter, a development charge order was issued on October 10, 1984 imposing a charge of $833,812. Against that order, the defendants appealed to the Minister for National Development, who, after consideration thereof, reduced the development charge to $420,000 and the penalty to $21,240. The reduced development charge was duly paid by the defendants. On January 8, 1985, the architect submitted to DBCD for planning approval revised plans incorporating the deviations; these plans were subsequently returned to the architect for certain corrections and were later re-submitted by the architect. On April 17, 1985, approval was granted under section 9(1) of the Planning Act. Thereafter, the architect submitted revised building plans for approval which was given on November 5, 1985.

During this period, while the defendants and their architect were seeking approval for the unauthorized deviations, certain developments took place in the affairs of the plaintiffs. When the plaintiffs purchased the premises in 1982, they obtained the necessary finance from Lee Wah Bank Limited ("LWB") and the premises were mortgaged to the bank as security. At that time, as no subsidiary strata certificate of title had been issued only an equitable mortgage of the premises could be created. In early 1984 or thereabout the plaintiffs decided to change their bank: to substitute Overseas Union Bank Limited ("OUB") for LWB as their banker. They therefore applied to OUB for overdraft and other banking facilities which were approved subject to certain conditions. One of the conditions was that the premises were to be mortgaged to OUB as security; and this of course involved a discharge of the mortgage then subsisting in favour of LWB and a creation of a mortgage – an equitable mortgage – in favour of OUB. The latter's solicitors, in the course of preparing the necessary security documents, submitted legal requisitions concerning the premises to various government departments, including DBCD. In answer to a question in the legal requisition whether there is any planning decision, DBCD said:

> "Proposed retention of pump house/additional water tanks on the roof and additional areas to approved ten-storey flatted factory. Approved in-principle to expire two months from July 23, 1984 subject to –
>
> (i) March 10, 1984 to be taken as the material date for variation of development charge;
>
> (ii) payment of development charge for the increase in plot ratio from 3.92 (gross) to 4.22 (gross);
>
> (iii) payment of penalty fee for all the works carried out without planning approval, the amount being $106,200, and
>
> (iv) compliance with other technical requirements."

OUB's solicitors did not find this answer satisfactory. Accordingly, they referred the requisition to the plaintiffs' solicitors, who in turn sought clarification from the defendants' solicitors. No satisfactory replies were furnished by the defendants' solicitors and in turn the plaintiffs' solicitors could not furnish any satisfactory explanation to the solicitors of OUB. Because of this, OUB declined to accept the premises as security with the result that the proposed mortgage was never completed and the plaintiffs did not succeed in obtaining the facilities they required from OUB. That occurred in September, 1984 or thereabout.

Following the unsuccessful attempt in obtaining the required facilities from OUB, the solicitors for the plaintiffs wrote a series of letters or telexes to the defendants' solicitors pressing for information as to whether applications for subdivision approval under section 9(3) of the Planning Act and for subsidiary strata certificate of title had been made, to which the defendants, unfortunately and for some inexplicable reasons, failed to give any satisfactory or substantive reply. Indeed there was a conspicuous silence on the part of the defendants. The litigation might have been avoided if the defendants had informed the plaintiffs of the approval which the defendants' architect received from DBCD, *i.e.* the content of the letter of July 21, 1984 (exhibit DB 76), and the steps

then taken and to be taken towards fulfilling the conditions laid down by DBCD. As no such reply was given, the plaintiffs' patience presumably was exhausted. Accordingly, on October 30, 1984, the plaintiffs took out this originating summons against the defendants.

By an order made on January 17, 1985, these proceedings were ordered to continue as though begun by a writ and the parties were required to deliver pleadings. By their statement of claim, the plaintiffs claim: (i) an order requiring the defendants to perform all such acts and make all such payments as are necessary for obtaining subdivision approval under section 9(3) of the Planning Act and the subsidiary strata certificate of title of the premises, which in effect is an order for specific performance, and (ii) an inquiry as to damages. The plaintiffs rely on clause 11 of the second agreement under which the defendants were obliged at their own costs and expenses to obtain the subdivision approval and the subsidiary strata certificate of title and aver that the defendants were in breach of their obligation under this provision. In their defence, the defendants deny that they were in breach of the contract and set out the events that had transpired in seeking to obtain the approval and the subsidiary strata certificate of title. They also rely on clause 11 which provides, *inter alia,* that any delay in obtaining the approval shall not be a ground for any action, claim or demand for damages by the plaintiffs.

When these proceedings started in October 1984, the defendants had not as yet obtained formal approval under section 9(1) of the Planning Act in respect of the unauthorized deviations, and, as I have mentioned, such approval was obtained only in April 1985. Thereafter, the defendants' architect attended to the submission of amended building plans for approval, and he obtained approval of such building plans on November 5, 1985. Only when such building plan approval had been obtained could the application for subdivision approval be made, as in submitting the application the defendants' surveyor had to submit several sets of approved building plans certified by DBCD. These certified plans were eventually obtained, and the defendants' surveyor on February 22, 1986 or thereabout submitted the application together with the necessary plans and documents for subdivision approval.

These proceedings first came before me in January 1986, and at that date the defendants had not obtained subdivision approval under section 9(3) of the Planning Act and the strata title plan approval. In fact, formal application with certified building plans had not, as at that time, been submitted to the competent authority. The hearing did not conclude within the number of days as initially alloted and, accordingly, was adjourned to a date to be fixed by the Registrar.

On May 26, 1986 approval for subdivision was granted and subsequently strata title plan of the building was obtained, and the subsidiary strata certificate of title of the premises was issued on March 9, 1987. In April 1987, the defendants executed and delivered to the plaintiffs the instrument of transfer of the premises together with the duplicate subsidiary strata certificate of title of the premises.

The hearing of these proceedings resumed in May 1987, and at that stage the claim for specific performance did not fall to be considered and the only claim outstanding is one for damages. In this connection, there are two issues before me: (i) whether there was such delay in obtaining the subdivision approval under section 9(3) of the Planning Act and subsidiary strata certificate of title of the premises as to amount to a breach of clause 11 of the second agreement, and (ii) if the answer is in the affirmative, whether the claim by the plaintiffs for damages is barred by the concluding part of clause 11. Both issues turn on the construction of clause 11, which is in the following terms:

> "The vendor shall at its own cost and expense obtain (a) the approval of the competent authority under section 9(3) of the Planning Act (Cap. 279) and (b) the said subsidiary strata certificate of title for the separate disposal of the said premises but any delay in obtaining such approval shall not be a ground for any delay by the purchaser in the payment on due date of any of the instalments of the purchase price mentioned in clause 4 hereof and the interest thereon (if any) and also shall not be a ground for any action claim or demand for damages by the purchaser against the vendor."

This provision falls into two parts: the first part thereof ending with the word "premises" imposes an obligation on the vendor to obtain (a) the subdivision approval under section 9(3) of the Planning Act, and (b) the subsidiary strata certificate of title of the premises, and as no specific time has been stipulated or expressed therein, the vendor is obliged to obtain the items in (a) and (b) within a reasonable time. The approval of the competent authority under section 9(3) as contemplated in this clause is subdivision approval

of the land on which the building stands and strata subdivision approval of the building. If the vendor fails to obtain the subdivision approval within a reasonable time, or, putting it in another way, if there was any unreasonable delay in obtaining it, then the second part of this provision arises: it protects the vendor against refusal by the purchaser to pay the instalments of the purchase price on due dates – that part has no relevance here – and also relieves the vendor from liability to any action, claim or demand for damages.

The first question therefore is whether there was any delay on the part of the defendants in obtaining the subdivision approval, and that is a question of fact. On the facts as established, it certainly appears that the defendants took a long time in obtaining subdivision approval and the subsidiary strata certificate of title of the premises. Plainly, the delay was due or attributable to the fault of the defendants' architect in charge of the construction of the building; he had failed or omitted to submit the necessary application and plans prior to the commencement of the deviations mentioned above, and owing to such default on his part, the consideration by DBCD of the application for approval of such works was deferred for a long time – about four years. It is argued by Mr. Tan on behalf of the defendants that they were not responsible for such fault or default on the part of their architect and the delay occasioned. The architect at all material times was acting independently in his professional capacity and was their independent contractor. I am unable to accept such an argument. The question here is whether there was a breach of contract on the part of the defendants, and if there was a breach, it is immaterial whether the breach was caused by the officers or servants of the defendants or their independent contractor. On such a technical matter as the application for necessary approval of the works in question, the defendants obviously had to entrust it to their professional adviser, *i.e.* their architect, and they must be treated as having control in relation to all matters dealt with or ought to have been dealt with by their professional adviser. The defendants must therefore be held responsible for any act or omission on the part of their adviser and cannot escape liability by showing that their failure to discharge their obligations under clause 11 was occasioned by those whom they engaged to handle the matter.

Next, it is argued on behalf of the defendants that in considering whether or not there was any delay in obtaining subdivision approval and the subsidiary strata certificate of title under clause 11, the events that occurred and the delay in attending to the relevant matters during the period prior to the date of the second agreement should be disregarded. The parties executed the second agreement on September 24, 1982 and I should therefore consider only events and matters arising as from that date. This argument also I cannot accept. In considering this question, one cannot disregard "the factual matrix of the background" in which the parties were at the time the second agreement was made. The plaintiffs purchased the premises from Tuin in June 1982 or thereabout and Tuin in completing the sale thereof to the plaintiffs by a deed of assignment dated September 24, 1982 assigned to the plaintiffs all their rights and interest under the first agreement and the defendants had notice of such assignment. By that assignment, the plaintiffs had acquired all the rights and interest of Tuin under the first agreement. To establish direct contractual nexus between the plaintiffs and the defendants, the second agreement was made. Further, at that time, the premises had been completed and had been in occupation by Tuin for about 4½ years, and one would expect, on any reasonable basis, that given this long period of time that had elapsed, the subdivision approval and the subsidiary strata certificate of title would be obtained shortly thereafter, say one to two years. Unfortunately, that was not the case. The subdivision approval was obtained only on May 26, 1986 and the subsidiary strata certificate of title on March 9, 1987. In all the circumstances, I find that there was an inordinate delay on the part of the defendants and they were in breach of their obligation under clause 11.

I now turn to the second part of clause 11, which is this: any delay on the part of the defendants in obtaining the subdivision approval "shall not be a ground for any action, claim or demand for damages." Mr. Tan relies on this part of clause 11 and submits that the claim for damages must fail. Such a provision (which I call the exclusion clause), in my view, is a bar to an action for damages for breach of the defendants' obligation under clause 11. However, Mr. Liu, on behalf of the plaintiffs, submits that this is an action for specific performance, and the damages asked for are in addition to or in lieu of the decree of specific performance, and the exclusion clause has no application. In this submission, this action was properly constituted: at the commencement of the action, no subdivision approval had been obtained and this remained the position up to the time of the initial hearing of the action which did not con-

clude. When the hearing resumed subsequently, the subdivision approval and the subsidiary strata certificate of title were obtained, and in consequence, it has become unnecessary for the court to make an order for specific performance, but the court in exercise of its equitable jurisdiction should in the circumstances make an order for damages in lieu of specific performance, and the exclusion clause has no application. In effect, Mr. Liu's submission, if I understand him correctly, briefly is this: the exclusion clause, though it precludes a claim for damages at law, is no bar to an order for damages in equity. In support, Mr. Liu relies on the case of *Oakacre Ltd.* v. *Claire Cleaners (Holdings) Ltd.*[1] There, the plaintiffs claimed specific performance of a contract for sale of land and also damages in addition or in lieu of the equitable remedy. It was found, and indeed at the trial it was conceded, that a claim for damages at law was premature and therefore could not be sustained. As for the claim for specific performance, since the issue of the writ, completion of the sale and purchase of the land had taken place, and, therefore, specific performance did not fall to be considered by the court. It was held, however, that, notwithstanding that the claim for damages at law was premature, the court in exercise of its equitable jurisdiction could make an order for damages in lieu of specific performance and an order was made for inquiry as to damages. Judge Mervyn Davies said, at p. 203:

"This action was started in good faith as a specific performance action with a claim for damages in addition or in lieu. It was not started as a claim for damages and nothing more. Within the framework of a specific performance action the court may, in my view, award damages for delay in completion despite the fact that the action was instituted before the contractual date of completion. I think it is satisfactory to be able to come to this conclusion. Otherwise, to my way of thinking, the situation would be unjust. Despite the fact that the specific performance writ was properly issued, the plaintiffs would find themselves deprived, in this action anyway, of part of the relief to which they are, in my view, entitled."

Another authority which is of some assistance on this point is *Chapman, Morsons & Co.* v. *The Guardians of the Auckland Union*[2] where the plaintiff initiated an action against a sanitary authority claiming for an injunction to prevent the authority from causing a nuisance by the discharge of sewage into a stream. At the trial, the learned judge found that the defendant did cause a concentration of sewage near the plaintiff's property and did cause a nuisance but the danger had passed away and that only in exceptionally dry season could a nuisance be caused by the defendant. He refused to grant an injunction but awarded damages in lieu. On appeal, it was argued that such an award of damages was not sustainable as the plaintiff had not given notice of action for damages as required under section 264 of the Public Health Act 1875. It was held by the Court of Appeal in dismissing the appeal that that action was one for an injunction and the Chancery Amendment Act 1858, commonly called Lord Cairns' Act, empowered the court to award damages in lieu of injunction and the provision of the statute as regards notice of action was not applicable. Lord Esher M.R. said at p. 298:

"The absence of notice could not prevent the maintenance of the action, for it is admitted that the provision could not apply to the action for an injunction, but it would cripple the powers of the court as to the remedy to be applied. I never heard of such a thing as a provision with regard to notice of action, which had the very strange effect, not of preventing the action being brought without notice, but, when the action had been brought and tried, and all that remained to be done was to pronounce judgment, of crippling the court's power of judgment as to the appropriate remedy to be applied. For these reasons I do not think that such a provision prevented the Court of Chancery from giving damages where they were given as an alternative remedy instead of an injunction, although no notice of action had been given."

In this case, because of the exclusion clause, a claim for damages at law for breach of contract cannot succeed. But this action, being one for specific performance, is outside the ambit of the clause. If at all damages can be awarded, they can only be awarded in equity, *i.e.* by this court exercising its equitable jurisdiction to award damages in lieu of specific performance. The question therefore is: has this court the jurisdiction to make such an award? If it has, I would in the circumstances be disposed to make an order for an inquiry as to damages. However, there is, in my view, one fundamental objection, and it turns on the jurisdiction of the court to award damages in addition to or in lieu of specific performance.

In England, the jurisdiction to award damages in addition to or in lieu of specific performance is based on statute, and the first statute that gave such jurisdiction to the courts – at that time the Court of Chancery – was Lord Cairns' Act. Section 2 of Lord Cairns' Act conferred on the Court of Chancery jurisdiction to award damages in addition to or in lieu of injunction or specific performance. It provided as follows:

"In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against

the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct."

Prior to the passing of this Act, the Court of Chancery had no such jurisdiction to award damages in addition to or in lieu of injunction or specific performance, though it did in exceptional cases make awards of damages or make orders for payment of money. In normal circumstances, the Court of Chancery would grant only equitable reliefs, such as injunction or specific performance, and leave it to the parties to pursue their remedy for damages in the courts of common law. Lord Esher in *Chapman, Morsons & Co.* v. *The Guardians of Auckland Union*[2] said, at pp. 297 to 298:

"In cases where a suit for an injunction lay in Chancery damages would be recoverable at common law, and in many cases the Court of Chancery would not grant an injunction till the right to damages had first been established by an action at law. Lord Cairns' Act was passed to meet that difficulty, and was one of those enactments that have from time to time been passed to prevent the necessity for double proceedings. It was intended to obviate the necessity for going to a common law court for damages and then to the Court of Chancery for an injunction, and to enable the Court of Chancery itself to determine the right to damages and then give an injunction. But the Act went further than that and gave the Court of Chancery power to give damages in substitution for an injunction."

Thus, the purpose, or one of the purposes, of Lord Cairns' Act was to enable the Court of Chancery to dispose of the matter before it completely by awarding, where it deemed fit, damages in addition to injunction or specific performance which it granted, or damages in substitution for such equitable relief which it refused. But section 2 of the Act as applied by courts subsequently went further: it conferred jurisdiction to award damages in equity where no damages could be awarded at law. In *Leeds Industrial Co-operative Society Ltd.* v. *Slack*[3], the House of Lords by a majority held that the Act empowered the court to award damages *quia timet*. In that case, an injunction was sought to restrain a threatened obstruction of ancient lights; no obstruction, however, had taken place at the date of the trial, and accordingly there could be no claim for damages at law. Damages, however, was awarded under the Act for the threatened injury. More recently in *Price* v. *Strange*[4] in which the plaintiff successfully sued for specific performance of an oral agreement for an underlease relying on part performance on his part, Goff L.J. (as he then was) said at p. 358:

"Taking the view I have it is unnecessary for me to decide the other question, namely, whether if specific performance were refused damages could be awarded in lieu, but as it was very fully argued I think it right to express my views upon it. Having regard to section 40 of the Law of Property Act 1925 damages could not be awarded at law, but, in my judgment, that would not prevent an award of damages in equity under Lord Cairns' Act. One purpose and a very important purpose of that Act was, of course, to avoid circuity of action by enabling the old Court of Chancery to award damages at law, but the Act clearly went further and enabled that court to give damages where there was no cause of action at law. This was envisaged as early as 1863 in *Eastwood* v. *Lever* (1863) 4 D.G.J. & Sm. 114 which was an action for breach of a restrictive covenant where there was no privity at law; and in the like case damages were awarded in *Wrotham Park Estate Co. Ltd.* v. *Parkside Homes Ltd.* [1974] 1 W.L.R. 798, 811. That the Act has this wider scope was settled beyond question by the House of Lords in *Leeds Industrial Co-operative Society Ltd.* v. *Slack* [1924] A.C. 851, a *quia timet* action in respect of a threatened tort."

Lord Cairns' Act was repealed by the Statute Law Revision and Civil Procedure Act 1883, but the jurisdiction conferred was saved by section 5(b) of the latter, which provided as follows:

"The repeal effected by this Act shall not affect —
...

(b) Any jurisdiction or principle or rule of law or equity established or continued, or ... by or under any enactment repealed by this Act;

..."

Lord Finlay in *Leeds Industrial Co-operative Society Ltd.* v. *Slack*[3] at pp. 861-862 summarized the history of Lord Cairns' Act as follows:

"Lord Cairns' Act became law in 1858. Section 16 of the Judicature Act 1873 vested in the High Court justices the jurisdiction which was vested in or capable of being exercised by the Courts of Chancery and the courts of common law. All courts of the Chancery Division acquired thereby the power of awarding damages, and they had, of course, the power of granting injunctions. In 1883 there was passed the statute 46 and 47 Vict. c. 49, being the Statute Law Revision and Civil Procedure Act 1883, repealing Lord Cairns' Act, but with the proviso in section 5 that the repeal should not affect any jurisdiction or principle or rule of law or equity established or confirmed by any enactment so repealed. The Statute Law Revision Act of 1898 (61 & 62 Vict. c. 22) repealed parts of that Act of 1883, including section 5, and the repealing section of the Act of 1898 (section 1) contains a proviso that the Act shall not affect any principle or rule of law or established jurisdiction, notwithstanding that the same might have been affirmed by or derived from any of the repealed eanctments."

He expressed the view that the jurisdiction conferred by Lord Cairns' Act remained notwithstanding the repeal thereof. He said at pp. 862-863:

"In my opinion the view presented on behalf of both of the parties at your Lordships' Bar that the substance of Lord Cairns' Act remains in force in spite of the repeal is correct. For the purpose of arriving at this conclusion it is, I think, necessary to look at the combined effect of the Judicature Act 1873, and the saving clauses in the Statute Law Revision Acts; for this purpose the saving clauses in the two repealing Acts are to the same effect. The Judicature Act conferred the power to award damages on the courts of the Chancery Division and in estimating the damages the principles which Lord Cairns' Act laid down are still applicable by virtue of the saving clause in the Statute Law Revision Act. The court, therefore, retains the power of awarding damages on the principles which I have stated in dealing with the terms of Lord Cairns' Act itself. The Act itself is now repealed, but the combined effect of section 16 of the Judicature Act and the saving clause is that the law and practice on this point remain unaltered."

The provision of Lord Cairns' Act conferring jurisdiction to award damages is, in substance, now found in section 50 of the Supreme Court Act 1981 in England, which is as follows:

"50. When the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance."

It seems to me clear that the jurisdiction to award damages in addition to or in lieu of injunction or specific performance is based on statute and is not a matter of inherent jurisdiction of the court. The question, therefore, that immediately arises is whether there is any statute that confers on this court such jurisdiction. In *Tan Seng Qui* v. *Palmer*[5] at p. 257, Pellereau J. said, *obiter:*

"It will be noticed that I have not alluded to the legal point which was argued in the case, as to whether the Statute of Frauds was a bar to the plaintiff's claim for damages. I incline to think it was not as the part performance took the case out of the statute. I incline to think that the damages that this court can award are the same as in England under Lord Cairns' Act where it was provided that in every case where specific performance could have been granted the Court of Chancery could in addition to, or substitution for, decreeing specific performance, award damages for any breach of the contract. That Act has been repealed, but the jurisdiction conferred by it is saved; the High Court of Justice in England therefore had and still has that power. Our Ordinance 3 of 1878, section 10, confers on this court the same jurisdiction as was possessed at that time by the High Court of Justice in England and as that court can give damages, it would seem that this court can do so too."

That *obiter dictum* was based on the provision of section 10 of the Courts Ordinance, No. 3 of 1878; its successor, the Courts Ordinance (Cap. 3 of 1955 Ed.), had a similar provision in section 17(a), namely:

"17. The original civil jurisdiction of the High Court shall consist of –

(a) jurisdiction and authority of a like nature and extent as are exercised by the Chancery and Queen's Bench Divisions of the High Court of Justice in England."

..."

Pausing here, I am inclined to say that on the basis of that section the court would have the jurisdiction conferred by section 2 of Lord Cairns' Act. Unfortunately, the Courts Ordinance (Cap. 3), including section 17, was repealed by the Courts of Judicature Act 1964 of Malaysia, and the latter had no provision similar to that of section 17(a) of the Courts Ordinance. Nor did the repealing Act contain any provision saving the jurisdiction conferred by the Courts Ordinance. Astonishing as it may seem, the repealing Act, intentionally or unintentionally, took away the jurisdiction which the High Court had under the Courts Ordinance to award damages under section 2 of Lord Cairns' Act. The Act of 1964 of Malaysia, with effect from January 9, 1970, ceased to apply to Singapore by virtue of section 82 of the Supreme Court of Judicature Act 1969, which is now the Supreme Court of Judicature Act (Cap. 322, 1985 Ed.). This Act also does not have any provision similar to section 17(a) of the Courts Ordinance (Cap. 3); nor does it have the equivalent of section 50 of the Supreme Court Act 1981 of England. Mr. Liu relies on section 3(h) of the Civil Law Act (Cap. 43, 1985 Ed.), which is as follows:

"(h) the court in the exercise of its original jurisdiction and the Court of Appeal, in every cause or matter pending before it, shall grant, either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled to, in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

I do not find this provision of any assistance. It does not confer on the court any new jurisdiction either at law or in equity which it does not have. It only empowers the court to apply rules of law and equity concurrently and give such remedies as it has at law or in equity so that all matters in controversy "may be completely and finally determined". The whole of section 3 is *in pari materia* with section 24 of the Supreme Court of Judicature Act 1873 of England which brought about the fusion in the administration of law and equity in England. But the jurisdiction to award damages in addition to, or in lieu of, injunction or specific

performance was founded entirely on Lord Cairns' Act and not section 24 of the Supreme Court of Judicature Act 1873.

I am therefore of the opinion I have no jurisdiction – the equitable jurisdiction conferred by Lord Cairns' Act – to award damages in lieu of specific performance in this case. I have, of course, jurisdiction to award damages at law for breach of contract. But, in this case, by reason of the exclusion clause damages cannot be awarded at law. In the result, no damages can be awarded either at law or in equity. The plaintiffs' claim is therefore dismissed.

The costs of these proceedings, however, should be borne substantially by the defendants for these reasons. First, as I have shown, the defendants' conduct largely contributed to the present litigation. Secondly, this action for specific performance was properly constituted, but because of the supervening events it has become unnecessary for this court to make an order for specific performance and for reasons I have given I cannot order damages in equity. In all the circumstances, I order the defendants to pay to the plaintiffs three quarters of the costs of and incidental to this action.

Order accordingly.

Solicitors: *Lim Ganesh & Liu; Lee & Lee.*

RE PAC-ASIAN SERVICES PTE. LTD.

[O.C.J. (Chao Hick Tin J.C.) December 16, 1987]

[Singapore – Companies Winding up No. 53 of 1986]

Company Law – Winding-up proceedings – Order of court appointing provisional liquidators – Order discharged – Whether provisional liquidators could be paid their remuneration and expenses – Whether company subject to winding up should pay for the remuneration and expenses – Principles applicable.

The three applicants were appointed by an order of court as provisional liquidators of a certain company which was the subject of a winding-up petition. The appointment of the applicants was made after an *ex parte* application was made by the petitioning creditor.

The company thereafter sought to discharge the appointment of the applicants as provisional liquidators. The application was refused but on appeal to the Court of Appeal, the order was discharged.

In view of the discharge of order, the questions arose as to whether the applicants should be paid their remuneration and expenses and if so by whom.

Held: (1) a provisional liquidator appointed by the court stands in precisely the same position as a court-appointed receiver. Such a provisional liquidator is an officer of the court. He is also in every sense a receiver;

(2) the provisional liquidators in the present case were entitled to be paid their just remuneration and be reimbursed of the expenses properly incurred out of the assets of the company that were administered by the provisional liquidators and were held by them. Accordingly, until determined by the court, they also have a lien over these assets up to an amount equivalent to their total claims.

Cases referred to:

(1) *Nationwide News Pty. Ltd.* v. *Samalot Enterprises Pty. Ltd. (No. 2)* [1986] 10 A.C.L.R. 748.
(2) *Starr* v. *Trafalgar Financial Corporation Ltd. No. 2* [1983] 8 A.C.L.R. 367.
(3) *Booth* v. *Thomson* [1972] S.L.T. 141.
(4) *Re Bridal Centre Co. Pty. Ltd.* [1985] 9 A.C.L.R. 481.
(5) *Re Central Commodities Services Pty. Ltd.* [1984] 8 A.C.L.R. 801.
(6) *Re Beni-Felkai Mining Co. Ltd.* [1934] Ch. 406.
(7) *Braid Builders Supply and Fuel Ltd.* v. *Genevieve Mortgage Corporation Ltd.* 29 D.L.R. (3d.) 373.
(8) *Campbell* v. *Compagnie Generale De Bellegarde* (1876) 2 Ch.D. 181.

COMPANIES WINDING-UP.

Davinder Singh for the applicants.
Manjit Singh for the company.

Cur. Adv. Vult.

Chao Hick Tin J.C.: The applicants, Jeffrey Heng, Wong Yew Meng and Roger Edmonds, were appointed by an order of court dated January 24, 1986 as provisional liquidators of the company pursuant to an *ex parte* application of the petitioning creditors, European Asian Bank Aktiengesellscheft ("EAB"), in these winding-up proceedings. The order was made subject to the usual undertaking as to damages.

The company thereafter applied to discharge the appointment of the provisional liquidators. The application was refused. On appeal to the Court of Appeal, the appellate court allowed the appeal and discharged the order dated January 24, 1986. The Court of Appeal also ordered that there would be